



No. 77-1053

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19\_\_\_\_\_

CAROL NUTTER,

Petitioner,

vs.

PERFECTO TORREZ d/b/a  
PERFECTO PLUMBING AND  
SEWER SERVICE INC.  
AND WILLIAM FURNACE COMPANY

Respondents.

\_\_\_\_\_  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF KANSAS

\_\_\_\_\_  
RESPONDENT'S BRIEF IN OPPOSITION

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Attorney for Respondent  
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### ARGUMENT

The respondent opposes the petition for writ of certiorari on two grounds:

(1) The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case.

The petition for writ of certiorari is plainly out of time. The judgment of the Kansas Supreme Court denying a review of the Court of Appeals decision was entered on September 8, 1977, simultaneous with its opinion. The rules of the Kansas Supreme Court regarding a motion for rehearing or modification are as follows:

- (a) A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the

effect of the original decision until the matter is decided on rehearing.

- (b) If no motion for rehearing is filed or upon denial of a motion for rehearing, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Supreme Court to the district court together with a copy of the opinion. (Kansas Appellate Rules No. 7.06)

The petitioner's motion for reconsideration by the Supreme Court was filed in the Kansas Supreme Court on October 4, 1977. This is clearly more than twenty (20) days from the date the Supreme Court entered its order denying a review of the Court of Appeals decision, thereby becoming a final judgment of the lower court. Pursuant to 28 USC §2101(c) the petition for a writ of certiorari must be filed within ninety (90) days upon the entry of the final judgment in the lower court. This period of time expired on December 7, 1977.

In the case of Department of Banking v. Pink 317 US 264, one of the cases cited by the petitioner, this court held that a timely

petition for rehearing tolls the running of the three (3) month period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the right of the parties. Should this Court consider the application for reconsideration filed by the petitioner in the Kansas Supreme Court on October 26, 1977, as timely filed, it would merely toll the running of the ninety (90) day period of time. The Kansas Supreme Court rendered its decision denying that motion for reconsideration on October 26, 1977, and the statutory ninety (90) day filing time would run again. The balance of the ninety (90) day filing time would have expired on December 30, 1977. The petition for certiorari to the Kansas Supreme Court now before this court was not filed until January 23, 1978.

(2) No Federal Question Was Raised for Consideration Before Any of the Courts in the State of Kansas and Therefore this Court Lacks Jurisdiction.

This case was decided by the trial court, the Kansas Court of Appeals and the Kansas Supreme Court solely on the basis of a Kansas state statute. This statute is whether or not the defendants are entitled to judgment as a matter of law on the basis that there was no genuine issue as to any material fact. The state statute in question is K.S.A. 60-256 and is set forth in its entirety in the petitioner's petition beginning on page three (3). There is no Federal question on the face of the record in this case to warrant the jurisdiction of the Supreme Court of the United States to grant the Writ of Certiorari. (Mellon v. O'Neil 275 US 212)

The question attempted to be raised by the petitioner is set forth in the petition on page ten (10), "The Federal question involved herein surrounding right to jury trial and right to due process before deprivation of person and property . . ." was not raised before the trial court nor was it raised on the application for review of the Kansas Supreme Court nor finally was it raised in the petition for reconsideration filed by the petitioner in the Kansas Supreme Court on October 4, 1977. Before the Supreme Court may review the decision of a state court it must appear affirmatively from the record not only that a federal question was presented to the highest court of the state having jurisdiction but that its decision of the federal question was necessary for the determination of the case. (Honeyman v. Hanan 300 US 14; Wilson v. Cook 327 US 474)

The writ of certiorari should be dismissed where a claim advanced by petitioner's attorney

with respect to allegedly unconstitutional application of a state statute was raised for the first time upon certiorari, and the state court had been given no opportunity to pass upon it. (Monks v. New Jersey 398 US 71)

The petitioner is attempting to raise a federal question by alleging denial of her right to a trial by jury and deprivation of property without due process of law, rights granted to her by the 7th and 14th amendments to the United States Constitution. The United States Supreme Court has consistently held that the 7th amendment requirement of a trial by jury is not applicable to proceedings in state court. (Alexander v. Virginia 413 US 836; Curtis v. Loether 415 US 189)

In the case of Hiawauassee River Power Co. v. Carolina Tennessee Power Co. 252 US 341, this Court held that a claim in a state trial court that a ruling was contrary to the 14th amendment of the United States Constitution

affords no basis for a writ of error from the Federal Supreme Court where no such contention was made in the assignment of errors in the highest court of that state nor was it, so far as appears by the record, otherwise presented to or passed on by the court. In this case when the motion for summary judgment was filed in the trial court the petitioner did not raise any issue as to the constitutionality of the state's summary judgment law nor did she raise any argument as to her right to a trial by jury. The issues were not raised nor passed upon by any of the appellate courts in the State of Kansas.

Rule 19 of the United States Supreme Court provides for the considerations governing review on certiorari. This case does not present any federal question of substance not heretofore determined by this Court and therefore the writ should be denied.

#### CONCLUSION

Wherefore, the respondent respectfully submits that the petition for writ of certiorari to the Kansas Supreme Court should be denied for the above and foregoing reasons.

Original signed by:  
Michael J. Schenk

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#### CERTIFICATE OF SERVICE

Pursuant to Rule 33(1) of the Rules of the United States Supreme Court, the undersigned a member of the bar of this Court, hereby certifies and indorses that on the 21<sup>st</sup> day of February, 1978, three copies of the above and foregoing brief in opposition to the petition for writ of certiorari to the Supreme Court of Kansas were served on counsel for all parties

concerned, by placing such copies in the United States mail, first class, postage prepaid, addressed to counsel of record as follows:

James Benfer, 1400 Topeka Boulevard,  
Post Office Box 2217, Topeka, Kansas  
66601, Attorney for Perfecto Torrez,  
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1324 Topeka, Topeka, Kansas 66612  
Attorney for Petitioner

Further pursuant to Rule 24 (1) of the rules of this Court, forty (40) copies of this brief in opposition were mailed, first class, United States mail, postage prepaid, return receipt requested, to the Clerk of the United States Supreme Court on the 21<sup>st</sup> day of February, 1978.

Original signed by:  
Michael J. Schenk

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